

COMMONWEALTH OF MASSACHUSETTS

COMMISSION ON JUDICIAL CONDUCT

COMPLAINTS NUMBERS 2006-9 AND 2006-30,
AGAINST ASSOCIATE JUSTICE ERNEST B. MURPHY

HEARING OFFICER'S REPORT
Pursuant to G.L. c. 211C, §7(8)

FINDINGS

JUDGE MURPHY'S LAWSUIT AND LETTERS¹

1. On June 3, 2002, Judge Murphy filed a libel action in Suffolk Superior Court. against the *Boston Herald* and four of its employees.
2. On February 18, 2005, the jury returned a verdict against the newspaper and its employee David Wedge for \$2,090,000 (later reduced by the trial judge to \$2,010,000. The Supreme Judicial Court affirmed the judgment, Murphy v. Herald, 449 Mass. 42 [2007]).
3. Under date of February 20, 2005, Judge Murphy wrote Patrick J. Purcell, publisher of the *Herald*, on official Superior Court letterhead, concerning the lawsuit. A copy of that letter is attached as appendix A to exhibit 1 (introduced at the hearing before me). In the letter Judge Murphy requests a meeting with Mr. Purcell and sets forth various conditions and other matters relating to the meeting.
4. Judge Murphy also used court stationery to add a postscript to the letter (appendix B to exhibit 1). Judge Murphy there urges Mr. Purcell not to show the letter to anyone.

¹Paragraphs 1 through 9 were established in part through a Stipulation of Facts dated October 4, 2007, signed by the parties and introduced as exhibit 1 at the hearing

5. Judge Murphy mailed the letter and its postscript in a Superior Court envelope on which he handwrote "Murphy, J." above the printed return address (appendix C to exhibit 1). It was addressed to Mr. Purcell at the newspaper and was received by Mr. Purcell.

6. Under date of March 18, 2005, Judge Murphy wrote another letter to Mr. Purcell regarding the lawsuit (appendix D to exhibit 1). That letter was on plain stationery. In it Judge Murphy stated that Mr. Purcell had no chance of reversing the jury verdict.

7. Judge Murphy enclosed that letter in an official court stationery envelope (appendix E to exhibit 1). On the envelope Judge Murphy crossed out "Walter F. Timilty, Clerk of Courts" and handwrote "Murphy, J. Superior Court" above the Norfolk County court return address. It too was addressed to Mr. Purcell at the newspaper and was received by Mr. Purcell.

8. On December 20, 2005, copies of Judge Murphy's letters were filed in support of (an unsuccessful) motion by the defendants in the lawsuit to vacate the judgment.

9. On December 21, 2005 the *Herald* published excerpts from the letters in its print edition (appendix F to exhibit 1). The newspaper also published the full text of the letters on its website.²

HISTORY OF THE COMPLAINTS

10. On January 10, 2006, the Commission initiated a complaint against Judge Murphy relative to the facts described above. On February 17, 2006, the *Herald* filed a complaint against the judge regarding those facts. These are the two complaints numbered above.

11. After intermediate actions, the Commission initiated formal charges against Judge Murphy, dated June 26, 2007, pursuant to G.L. c. 211C § 5(14) and

² Copies of the letters are attached to this Report. I have also attached a table showing major dates.

Commission Rule 7B4. The Commission alleged “that Judge Murphy has engaged in willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer.”³ This misconduct is stated to include:

- (a) violation of Canon 1A of the Code of Judicial Conduct (Code), which, in part requires that “A judge shall participate in establishing, maintaining, and enforcing high standards of conduct and shall personally observe those standards, so that the integrity and independence of the judiciary will be preserved.”;
- (b) violation of Canon 2, which requires that “A judge shall avoid impropriety and the appearance of impropriety in all of the judge’s activities.”
- (c) violation of so much of Canon 2A as requires a judge to “act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”;
- (d) violation of so much of Canon 2B which requires that “A judge shall not lend the prestige of judicial office to advance the private interests of the judge...”;
- (e) violation of Section 4A(1) of Canon 4, which requires that “A judge shall conduct all of the judge’s extrajudicial activities so that they do not: (1) cast reasonable doubt on the judge’s capacity to act impartially as a judge.”; and
- (f) violation of Section 4D(1) of Canon 4, which requires that “A judge shall refrain from financial and business dealings that tend to reflect adversely on the judge’s impartiality, that may interfere with the proper performance of the judge’s judicial position, [or] that may

³These charges are based on subsections (5)(c) and (5)(d) of G.L. c 211C, §2, “Grounds for discipline” and are in addition to subsection (5)(e), conduct which violates the Code of Judicial Conduct.

reasonably be perceived to exploit the judge's judicial position."

The Commission then listed as specific allegations the various factual matters described in paragraphs one through nine above.

12. Under date of July 9, 2007, Judge Murphy filed with the Commission his answer to the formal charges. In that he denied the various allegations of impropriety alleged by the Commission. He admitted the specific factual allegations listed by the Commission (except disclaiming knowledge of the *Herald's* website) but added explanations and additional information as to some of them, including references to the Supreme Judicial Court's affirmance of his jury verdict, an assertion that his communications with Mr. Purcell were part of private, confidential settlement discussions, and an assertion that the newspaper's publication of the letters was a breach by Mr. Purcell of a personal agreement made by Mr. Purcell to treat communications between him and Judge Murphy in confidence.

13. The Commission filed the formal charges and the judge's answer with the Supreme Judicial Court on July 10, 2007, requesting the appointment of a hearing officer. The court appointed me to that position on or about July 25, 2007.

14. The formal hearing on the complaints took place October 15 and 16, 2007 before me. The hearing was public. Three witnesses (Judge Murphy, Howard M. Cooper, Esq., and Mr. Purcell) testified, all under oath. Both days of the hearing were transcribed. The Commission was represented by Howard V. Neff III, Esq. and Judge Murphy by Michael E. Mone, Esq. Gillian E. Pearson, Executive Director of the Commission, was also present, as was Judge Murphy throughout. Five exhibits were introduced and two exhibits were marked for identification. The hearing was closed as of October 30, 2007, to allow counsel time to file briefing.

FURTHER FACTS

15. Judge Murphy was appointed an Associate Justice of the Superior Court Department of the Trial Court on August 31, 2000 and, as of the date of the hearing, had served continuously in that capacity since appointment. As of the date of the hearing, he was not sitting as a judge.

16. At the date of the hearing, Mr. Purcell was the publisher of the *Herald* and had served in that capacity since 1984, thus including all times relevant here. He was at the time of the hearing also the “principal owner” of the *Herald*.⁴ I infer that he has been such since initial publication by the *Herald* of the articles concerning Judge Murphy. He does not have a law degree.

17. In his libel action, Judge Murphy was represented by Mr. Cooper, from the firm of Todd & Weld, LLP. The *Herald* and Mr. Purcell were represented by M. Robert Dushman, Esq. of the firm of Brown, Rudnick, Berlack, Israels, LLP. (Brown Rudnick). Brown Rudnick has been the *Herald*’s counsel, on both libel and business matters, since 1982. Mr. Dushman is deceased.

18.⁵ On February 13, 2002, the *Herald* published the first of several articles about Judge Murphy. The front page article, written by defendant David Wedge and another reporter, ran under the headline “Murphy’s law.” The article was subtitled “Lenient judge frees dangerous criminals,” and included a photograph of Judge Murphy with a caption describing him as “Under fire.”

19. The article began as follows:

“A wrist-slapping New Bedford Superior Court judge under fire for letting four accused rapists return to the streets in the past week has a pro-defendant stance and has heartlessly demeaned victims, according to records and sources.

According to several courthouse sources, Judge Ernest B. Murphy said of a teenage rape victim, ‘She can’t go through life as a victim. She’s [fourteen]. She got raped. Tell her to get over it.’

The exchange occurred in Murphy’s New Bedford Superior Court chambers last week when prosecutors confronted Murphy over his

⁴Transcript, day 1, page 205.

⁵ Paragraphs 18 through 24 are based primarily on the decision of the Supreme Judicial Court in *Murphy v. Boston Herald, Inc.*, 449 Mass. 42 (2007).

lenient sentencing practices. He also belittled a [seventy-nine] year old robbery victim when prosecutors pushed for a tough jail term for her attackers, reportedly saying, 'I don't care if she's [one hundred and nine], ' sources said."

20. The next day the newspaper ran a second article about Judge Murphy, that included a statement that a rape victim "took the stand and tearfully told the judge how the rape has affected her." The articles of February 13 and 14 were followed by other articles by the *Herald* sharply critical of Judge Murphy, which contained sweeping allegations of his incompetence to sit on criminal cases, his bias toward defendants, and his open hostility to victims and prosecutors. The majority of the articles repeated the statement attributed to the judge, "She's [fourteen]. She got raped. Tell her to get over it."

21. On March 7, 2002, with the approval and encouragement of the editors of the newspaper, reporter Wedge appeared as a guest on the televised talk show, "the O'Reilly Factor". When the show's host asked Wedge, "Are you absolutely one hundred per cent sure that Judge Murphy said that the rape victim should get over it?", Wedge responded, "Yes, he said this. He made this comment to three lawyers. He knows he said it, and everybody else that knows this judge knows that he said it."

22. After the publication of the two articles, Judge Murphy received "boxes of angry letters from people he did not know, many of them explicitly referring to the 'tell her to get over it comment'. Some of the letters contained death threats."⁶ Judge Murphy "saw offensive statements concerning himself, and threats of violence against his daughters, in an internet 'chat room' established and maintained by the *Herald*, in which people were able to 'chat' with Howie Carr, a *Herald* columnist and local radio talk show host ⁷, who had written a column in the *Herald* on February 20, deriding the plaintiff and repeating the 'tell her to get over it' statement."⁸

⁶ *Murphy v. Boston Herald, Inc.*, at p 66.

⁷Mr. Carr was not a defendant in the libel action.

⁸ *Murphy v. Boston Herald, Inc.*, at p 66.

23. The impact of the newspaper's articles on Judge Murphy was profoundly negative. As described by Justice Greaney:

"The Herald's publications devastated the plaintiff. Once a proud, gregarious man, he became diminished, scared and sad. The plaintiff's physician described the plaintiff as psychologically 'devastated and broken.' Diagnosed with severe posttraumatic stress syndrome, the plaintiff suffered from duodenal ulcer disease and irritable bowel syndrome and was required to undergo multiple invasive endoscopic procedures. There was evidence that his reputation in the legal community and collegial relationships with his colleagues deteriorated to the point where he felt 'radioactive'." ⁹

In Judge Murphy's words, "It was killing me and my family." ¹⁰

24. The impact on the judge's family was extremely stressful, as well. In particular, one of the judge's daughters was particularly affected. ¹¹ One of the judges's daughters was still in therapy at the time of the hearing.

25. After the articles appeared, Judge Murphy sought a retraction from the *Herald*, in vain.

26. Judge Murphy, through Mr. Cooper, then sought a meeting with Mr. Purcell. The meeting was arranged through Mssrs. Cooper and Dushman..

27. In a September 29, 2003 E-mail to Mr. Dushman to set the time and place of the meeting, (exhibit 2) Mr. Cooper stated: "We have agreed that the meeting will not be attended by counsel and will constitute confidential settlement discussions." That confirmed oral understandings between the attorneys to the same effect. Those understandings also covered the second meeting, in April 2004,

⁹ *Murphy v. Boston Herald, Inc.*, at pp 45-46.

¹⁰ Transcript, Day 1, 117, 21

¹¹ *Murphy v. Boston Herald, Inc.*, at p 67. Transcripts, Day 1, p117, 3-23.

see below. Mr. Purcell was either aware of those understandings or bound by Mr. Dushman's agreement as to them.

28. Judge Murphy's intent in seeking the meeting was to settle the libel action and, in particular, to convince Mr. Purcell that he should have independent counsel review the case after discussions with the judge and the judge's counsel as to whether Mr. Purcell was obtaining correct advice from its corporate counsel (Brown Rudnick).

29. The meeting between the judge and Mr. Purcell took place in October, 2003 at Mr. Purcell's office at the *Herald*. Judge Murphy urged Mr. Purcell to check his sources and to seek the advice of independent counsel. Mr. Purcell said he was confident in his sources and that he was following the advice of counsel.

30. At the time of the first meeting, Mr. Purcell was aware that Judge Murphy was a judge.

31. During the meeting the judge said to Mr. Purcell "Everything between us is between us, right, Pat?" Mr. Purcell responded "Absolutely" and they shook hands.¹² The judge left the meeting thinking he and Mr. Purcell had established a personal line of communications, as principals in the case.

32. Judge Murphy, through Mr. Cooper, sought a second meeting with Mr. Purcell in or about April 2004. Around that time The *Herald* and Mr. Purcell were unsuccessful in a summary judgment motion and Judge Murphy's memory is that he sought the second meeting shortly after the ruling on the motion (or if not then, at least after the motion had been argued.)

33. The second meeting was also arranged by counsel and took place, at Mr. Purcell's office, in or about April, 2004. Judge Murphy sought to impress on Mr. Purcell that the judge had a strong case and that the suit should settle or be submitted to mediation.

34. At both meetings, Judge Murphy attempted to explain to Mr. Purcell the adverse effect that the *Herald's* actions were having on him and his family. The

¹² Transcript, Day 1, p. 42, 7 - 20.

judge was "visibly upset, emotional" at the first meeting with Mr. Purcell and "even more forceful" during the second.¹³

35. The judge left the meeting thinking that he and Mr. Purcell had established, and could continue, a personal line of communications, as principals in the case and that his relations with Mr. Purcell were confidential, as settlement discussions.

36. At neither meeting was there a specific discussion between the judge and Mr. Purcell regarding continuing contact about the libel suit without the knowledge of their respective attorneys. At no point did either the judge or Mr. Purcell give the other his phone numbers or e-mail address. There was no direct contact between Judge Murphy and Mr. Purcell between their two meetings or between the second meeting and the beginning of the trial (January, 2005).

37. The *Herald* made no settlement offer, no settlement resulted, the *Herald* indicated that it was not interested in mediation, and the case went to trial. The jury found that the *Herald* and reporter Wedge had published false statements about Judge Murphy and that they had done so either with actual knowledge that the statements were false, or with a high degree of awareness of their probable falsity.

38. After the jury verdict in his favor, Judge Murphy - because of the stress on him and his family - still wanted very much to settle the case, that is, to convince the *Herald* not to appeal. Therefore, through Mr. Cooper, he sought a four-way meeting - he, Mr. Cooper, Mr. Purcell, and an attorney for the *Herald*. The judge hoped that the *Herald's* attorney would be someone other than an attorney from Brown Rudnick, who could neutrally assess the situation. The *Herald* declined to have such a meeting.

39. Judge Murphy then concluded he could still communicate directly with Mr. Purcell, as a principal. The judge continued to believe that if he could communicate with Mr. Purcell, that Mr. Purcell would ultimately understand that the *Herald* would in all likelihood lose its appeal and end up paying Judge Murphy far more money than if the case settled then. The two letters then ensued.

¹³ Transcript, Day 1, page 179, 13,14; page 184, 7,8.

40. Judge Murphy's further intent as to a meeting with Mr. Purcell was to renew his urgings that Mr. Purcell obtain the advice of new counsel. The interest in new counsel was behind the judge's warning not to "involve Brown, Rudnick in this meeting." The judge acknowledges that Brown Rudnick had represented Mr. Purcell throughout the entire suit to that date. Judge Murphy believed that Brown Rudnick would necessarily have to defend the advice the firm had given the *Herald*, and accordingly he wanted to exclude them from the proposed meeting.

41. Judge Murphy explains the number \$3,260,000, that he demands in the first letter as follows: The verdict at that point was still at \$2,090,000. He calculated that pre-and post judgment interest brought the number to around \$2,800,000. The higher amount, \$3,260,000, was intended as a bargaining position and to "shake Mr. Purcell up" ¹⁴ into at least having his case reviewed by new counsel. Judge Murphy acknowledges that the tone of his correspondence was strong and that the tone was deliberate.

42. By referring to "ole Mike Ditka" the judge meant to remind Mr. Purcell that he had, in the two meetings with Mr. Purcell, warned him that the judge would win his case.

43. On March 18, 2005, the *Boston Globe* published an article alleging financial difficulties at the *Herald* (exhibit 3). That and associated articles prompted Judge Murphy to send the March 18, 2005 letter. The judge's intent and strategy as to the second letter were the same as for the first.

44. Judge Murphy did not obtain from Mr. Purcell the address to use for his letters; he obtained it through his own efforts.

45. The court stationery used by Judge Murphy had been provided to him in the usual fashion by the trial court, along with envelopes and business cards.

46. Mr. Purcell thought both letters were strange, coming from a judge, and that they were akin to "ransom notes" and an attempt to intimidate the *Herald*.¹⁵

¹⁴ Transcript Day 1, Pages 105-106

¹⁵ Transcript, Day 1, pages 187, 190.

However, Mr. Purcell did not in fact feel threatened or intimidated by the letters. Mr. Purcell sent both letters to Mr. Dushman. He and Mr. Dushman decided to do nothing about the letters, preferring to await the results of the appeal.

47. Mr. Dushman did not raise any objections with either Judge Murphy or Mr. Cooper, in regard to the letters. Mr. Dushman filed motions for judgment notwithstanding the verdict, and for a new trial, in the libel case. In those motions, he did not raise the communications which had occurred either in person or in writing between Judge Murphy and Mr. Purcell.

48. In the Spring or Summer of 2005, Mr. Cooper spoke at a newspaper association meeting. Messrs. Purcell and Dushman, and two other Brown Rudnick attorneys were present. After the speech, Mr. Cooper spoke with Mr. Purcell and Mr. Dushman and neither of the latter raised any issue with regard to the judge's letters, nor did Mr. Purcell state that he had been intimidated.

49. Attorney Bruce Sanford argued the appeal of the libel case for the *Herald*. He came into the case in early December 2005. There was then discussion between Messrs. Cooper and Dushman about a possible four-way meeting, but nothing came of that.¹⁶ Mr. Cooper first heard of the letters on December 20 or December 21, 2005, when asked about them by a reporter who had just attended a news conference held by Mr. Sanford at the *Herald*, disclosing the letters.

50. At no point after either letter did Mr. Purcell or his attorneys indicate to the judge or Mr. Cooper that the judge should not communicate further. Until Mr. Sanford disclosed the letters, no-one from the *Herald* communicated or complained to the attorneys representing Judge Murphy with regard to the letters.

51. The *Herald's* publication of excerpts from the letters in December 2005 was in part in response to a motion by Judge Murphy to freeze the assets of the *Herald* and the intent in part was to show that Judge Murphy was attempting to have the *Herald* not pursue its appeal.

52. When he sent the letters, Judge Murphy was not aware that the Code of Judicial Conduct contained an express prohibition against use of judicial stationery.

¹⁶ Exchange of E-mails between the attorneys, exhibit 4.

He characterizes that as a change. Immediately after having been told by a colleague of the prohibition, he wrote a letter of apology to the *Globe*. In using judicial stationery, Judge Murphy did not intend to inject his judicial position into his communications with Mr. Purcell.

53. In a letter to Judge Murphy dated August 21, 2002, the now Executive Director of the Commission, Gillian Pearson, had "advised you to consider the appropriateness of using judicial stationery for certain purposes."¹⁷

54. The Code provision concerning use of "judicial letterhead and the judicial title" appears in the Commentary to Canon 2, Section 2B. There was no similar express provision in the Code when Ms. Pearson wrote her letter (indeed that version of the Code had no Commentary). The equivalent Canon itself, in the Code in 2002, was essentially the same as current Canon 2B.

55. In December 21, 2005, when the *Herald* published excerpts from the judge's letters and put the entire letters on its web site, the circulation of the paper was about 230,000 to 240,000. At the time, the *Herald* had about 3,000,000 persons visiting its web site per month, but Mr. Purcell did not know how many of those read the story about Judge Murphy.

56. Of the amount that the *Herald* and its insurers ultimately had to pay Judge Murphy, \$3,415,000, and the amount of its own legal fees, "millions of dollars"¹⁸, all but a deductible paid by the *Herald* (approximately \$500,000), was paid by the *Herald's* insurer. The amount that Judge Murphy asked for in the February 2005 letter (\$3,260,000) thus was substantially less than the amount ultimately paid by the *Herald* and its insurer as a judgment and for legal fees.

57. Mr. Purcell was at no point intimidated by the judge's conversations or letters. He did not leave the second meeting with the judge with an understanding that settlement discussions were still in progress or that there was a confidential private line of communication between him and the judge; I come to no conclusion as to Mr. Dushman's thoughts about those matters - there is evidence that would

¹⁷ Transcript, Day 1, pages 100 and 101

¹⁸ Transcript, Day 1, page 238

support an inference either way.

58. Mr. Mone suggests that the judge's two letters reflect both Judge Murphy's personality and his emotional entanglement with the libel case and that it is obvious that Judge Murphy has his own, colorful, style of speaking and expressing himself, that may not be everyone's style. I have no reason to question any part of that suggestion.

59. Much of the hearing was devoted to evidence as to whether - when Judge Murphy wrote the letters - a mantle of confidentiality covered them and whether they were covered by an agreement that Judge Murphy and Mr. Purcell could continue to have confidential private communications. Judge Murphy says yes and Mr. Purcell says no.

60. Judge Murphy's belief on those points was unreasonable. When the judge wrote the first letter, at least nine, and maybe ten, months had passed since the last meeting, with no communication between the judge and Mr. Purcell. The judge knew that the two meetings he did have with Mr. Purcell had been arranged by their respective attorneys. The landscape between them had dramatically altered in the interim - trial had been had and a verdict for the judge obtained. It was imprudent for the judge to go forward with the letters on the assumption that the ground-rules remained in place. A phone call to Mr. Cooper to sound out the other side was all that would have been necessary.^{19 20}

FINDINGS AS TO VIOLATIONS

¹⁹ I agree with the Commission's suggestion that repeated references in the letters to confidentiality and settlement negotiations show unease on Judge Murphy's part that all was well on those counts. I note also that when the idea of a second four way meeting surfaced in December 2005, the contacts were between the attorneys.

²⁰ I do not accept the implication from Mr. Mone that Judge Murphy would be absolved had matters been as the judge thought about his relationship with Mr. Purcell. The letters were, nonetheless, still on court stationery and were injudicious in content and tone.

61. There are general considerations that bear and merit repeating. The first are two paragraphs from the Preamble to the Code:

The Code must be read as a whole. Judges must be alert to the possibility that more than one Canon or Section may apply to a particular situation. As an example, before concluding that an action appears to be permitted by one of the more detailed provisions of the Code, the judge should consider whether, in the circumstances, the action is improper when measured against a more general provision, for instance, Section 2A....

The Canons and Sections are rules of reason. Some conduct that may literally violate a provision of this Code will be permissible because it does not violate the policy behind the prohibition or is *de minimis*. In addition, not every violation of the Code should result in disciplinary action. Whether disciplinary action is appropriate, and, if it is, what degree of discipline should be imposed, should be determined through a reasonable application of the text and should depend on such factors as the seriousness of the violation, the existence (or not) of a pattern of improper activity, and the effect of the improper activity on others, on the public perception of others, or on the judicial system.

62. The Code suggests a balancing act which judges must always keep in mind. On the one hand, a person does not completely lose his or her status as an ordinary citizen when becoming a judge. For instance, Canon 3B(9)'s prohibition against public comment contains an exception - it "does not apply to proceedings in which the judge is a litigant in a personal capacity." Canon 4C(1) prohibits a judge - generally - from appearing at public hearings before, or otherwise consulting with, an executive or legislative body or official "except when acting *pro se*." The Commentary on Canon 4A states in part "Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives." Canon 4G prohibits judges from practicing law, but also states: "Notwithstanding this prohibition, a judge may act *pro se*." The accompanying Commentary states in part: "This prohibition refers to the practice of law in a representational and not in a *pro se* capacity. A judge may act for himself or herself in all legal matters..."

63. On the other hand, any activity of a judge mentioned elsewhere in the Code is - as the Preamble tells us - subject to the general admonitions of Canons 1A and 2A. The Commentary to Canon 2A states:

Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen.

The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in the Code. The test for imposition of sanction for violation of this Canon is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

64. I quote above the Commentary on Canon 4A: "Complete separation of a judge from extra-judicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives." But that is immediately followed by the qualification: "Nevertheless, such activities must not be undertaken in such a way as to cast reasonable doubt on the impartiality of the judge." Similarly, the Commentary to Canon 4G, concerning acting as a lawyer pro se, requires: "In acting pro se, a judge must not abuse the prestige of office to advance the interests of the judge. An illustration of such abuse would be appearing before a local zoning board in a matter relating to the judge's property and referring to the judge's judicial capacity."

65. Finally, G.L. c. 211C, §7, relating to this proceeding, states in part: "The commission shall have the burden of proving the charges by clear and convincing evidence."

I conclude the Commission has done so.

66. In determining whether Judge Murphy violated one or more of the canons, his intent and the impact on Mr. Purcell are not determinative (they may bear on the question of sanctions). Mr. Purcell is and was an experienced business man and, beyond thinking the letters were odd, dismissed them. But that is not the point. The question is what a reasonable person would make of the judge's actions.

"The test for imposition of sanction for violation of this Canon is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired." (Commentary to Canon 2A)

67. The specifics of the Commission's grievances against Judge Murphy are that he:

- (a) Used court stationery.
- (b) Sent letters to the opposing side in a legal dispute in which he was personally involved.
- (c) Appeared to demand in settlement a premium on the jury verdict.
- (d) Appeared to give a legal opinion about the *Herald's* chances of success on appeal.
- (e) Urged Mr. Purcell not to involve its regular lawyers, Brown Rudnick, and to keep them in the dark about the letters.
- (f) Appeared to suggest that he had special insight into the court system and special influence over it.
- (g) Threatened Mr. Purcell and the *Herald*.
- (h) Urged Mr. Purcell not to appeal the jury verdict in a lawsuit in which the judge was the plaintiff.
- (i) Sent letters whose overall content and tone were inappropriate.
- (j) Sent his letters to the publisher of a major metropolitan newspaper.

68. Judge Murphy admits that his use of court stationery was improper.

69. Was his sending of the letters - by itself- improper, as the Commission suggests, because they were sent to the opposing side in a legal dispute in which the judge was personally involved? To accept that proposition is to say that a judge cannot communicate directly as a litigant and I see that as an unwarranted restriction. My conclusion here is narrow. It is that the mere sending of letters, ignoring their content and how a judge presents him or herself (and putting aside the use of court stationery) is not suspect.

70. The Commission argues that it was improper to demand a premium on the jury verdict, that is, an amount in excess of the verdict. Judge Murphy argues the amount was part of a settlement strategy, and in the hearing the parties discussed whether the amount was - at the time of the first letter - more than the jury verdict plus accumulated interest. (Judge Murphy admits it was and says the excess was to grab the *Herald's* attention). I do not see this accusation, standing on its own feet, as particularly telling. It does have some significance as further evidence of the pressure the judge sought to bring on the *Herald*, although that is balanced some by the fact that the judge offered to return the check if Mr. Purcell asked for it.

71. The Commission taxes Judge Murphy with appearing to give a legal opinion about the *Herald's* chances of success. I assume a judge can have a settlement discussion in his or her own lawsuit, and, that being so, can the judge not assert belief in the strength of his or her case? That would seem to be an obvious part of any settlement negotiation. But here the special line a judge must tread comes into play. The danger is that - when perceived by a reasonable person, a laymen, the judge's assertions will imply special significance or weight because they come from a judge. Judge Murphy crossed that line, witness the "Mike Ditka" comment and much of the content of the second letter.

72. I conclude it was improper for Judge Murphy to attempt to freeze the *Herald's* counsel out of the picture, indeed to require that they be kept in the dark about the meeting proposed in the first letter. I understand the judge's intent (to allow Mr. Purcell the benefit of - in the judge's view- better advice), but it is not the judge's role to dictate the identity of his opponent's counsel.

73. The Commission's assertion that the letters appear to suggest special

insight into the court system and special influence over it are an elaboration of the idea that Judge Murphy was speaking - writing - from his special position as a judge. I conclude a reasonable person would have that impression.

74. I agree with the Commission that the letters were threatening in tone. "It would be a BIG MISTAKE" could be explained away but to a reasonable ordinary reader, the tone is ominous. "Do what I say or you'll be sorry" is the message. The same can be said - to a lesser degree- of the final comment in the first letter: "I have not the slightest apprehension of failure of my ability to make you (and your insurer) concur in that assessment [in your distinct business interest]." The Commission argues a threat need not be explicit, and I concur. The recipient of such communications can reasonably apprehend that a judge can find ways to make good on threats.

75. The Commission argues that it was improper for Judge Murphy to urge Mr. Purcell not to appeal the jury verdict in a lawsuit in which the judge was the plaintiff and he did so in letters whose overall content and tone were inappropriate. Cannot a judge - in his own lawsuit - try to convince the opposition not to appeal? In the abstract, the answer is he can. But the key is how it is done. He cannot pressure the other side with communications on court stationery and having the content and tone of the two letters Judge Murphy sent.

76. It was imprudent of Judge Murphy to send the letters to the publisher of a major metropolitan newspaper - imprudent because of the manifest possibility that they would achieve wide circulation, increasing damage to the image of the court system. The Commission suggests this point is perhaps only one of aggravation of the judge's violations of the canons. That suggestion is consistent with the Commission's position (with which I agree) that the mere sending of the letters - having the content they do - was a violation.

77. Fresh from his victory with the jury and impelled by the stress the lawsuit was imposing on him and his family (particularly his children), Judge Murphy very much wished to forestall an appeal by the *Herald*. He sought a four- person meeting, with Mr. Purcell and lawyers for both sides. He was rebuffed in that. He had the proper model before him, from his earlier meetings with Mr. Purcell. He should

have sought the meeting - be it two or four person - through his attorneys. Instead, he launched two letters which, viewed in their entirety, can only be described - at best - as bizaare. The letters were not utterances from the bench in the back-and-forth of proceedings (I do not suggest they would be appropriate there). They were, instead, writings, giving the judge the chance to reflect on who he was and what his responsibilities were. A reasonable person, on reading the letters, reacts by asking "What could the judge have been thinking when he sent those?" The two letters do not "honor the judicial office as a public trust...[or]...enhance and maintain confidence in our legal system", to quote the Preamble to the Code.

78. I find that in sending the two letters, Judge Murphy violated Canon 1A of the Code. The Commission suggests that a violation of higher numbered canons of the Code necessarily means a violation of Canon 1. I need not embrace that proposition to find, as I do, that the judge's activities were not "high standards of conduct".

79. I also find that Judge Murphy has violated Canon 2, Canon 2A, and so much of Canon 2B as forbids the lending of the prestige of his office to advance his own interests.

80. Judge Murphy's suit against the *Herald* was an "extrajudicial" activity within the meaning of Canon 4. The Commission charges that the two letters "cast reasonable doubt on the judge's capacity to act impartially as a judge." The Commentary to Section 4A shows that its target is "bias or prejudice." The judge's letters are improper, but if impartiality is to mean anything different than impropriety, the letters do not suggest the judge cannot or will not act without bias or prejudice. I find Judge Murphy did not violate Section 4A(1) of Canon 4.

81. The Commission charges that Judge Murphy has failed to "refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality, that may interfere with the proper performance of the judge's judicial position [or] that may reasonably be perceived to exploit the judge's judicial position", as proscribed in Section 4D(1) of Canon 4. Insofar as that section deals with impartiality, I reach the same conclusion as I did with respect to Section 4A(1). But there is a larger problem. Does the Code cover the judge's lawsuit when it

speaks of "financial and business dealings"? If it does, the sending of the letters "may reasonably be perceived to exploit the judge's judicial position." However, I conclude that the lawsuit is not a "financial [or] business dealing" within the meaning of the canon. Surely, the lawsuit is about money, or stated differently, about honor as partly vindicated through money. But Section 4D deals with investments, compensation, service in a business, and gifts, and thus I find it does not reach the libel suit. Therefore there is no violation of Section 4D(1) of Canon 4.

82. The Commission charged generally (based on subsections (5)(c) and (5)(d) of G.L. c 211C, §2, "Grounds for discipline") "that Judge Murphy has engaged in willful misconduct which brings the judicial office into disrepute, as well as conduct prejudicial to the administration of justice and unbecoming a judicial officer." Counsel have not focused on those general charges and I do not understand that they do more than say in general terms what the more specific charges say. Be that as it may, I conclude that Judge Murphy has not engaged in "willful misconduct" but has engaged in "conduct prejudicial to the administration of justice and unbecoming a judicial officer."

RECOMMENDATIONS

83. In recommending a sanction, I have considered mitigating factors, aggravating factors, and other cases - the last considered to assure as far as possible that the sanction be commensurate with those imposed in other instances.

84. I consider to be mitigating factors:

the very substantial stress the judge was under as a result of the *Herald's* articles and their aftermath - stress on his own account and more biting, on behalf of his family;

the fact that the judge's actions were not willful. He believed he was operating under the protection of an agreement of confidentiality when he wrote the letters. I have found that was not the case and even if it had been, the letters were improper in tone and content, but the point here is that the judge thought he was within bounds;

None of Judge Murphy's conduct in this matter involved his activities as a judge. The conduct was part of his private, not judicial, life.

Counsel suggests that Judge Murphy has his own, colorful, style. That does not appear to me a mitigating factor. Rather, the style may be part of what got the judge into trouble.

85. Aggravating factors:

In sending the letters to the publisher of the *Herald*, the judge increased by a vast margin the chances that his letters would be subject to wide scrutiny;

The judge had been warned to watch out about the use of court stationery;

When he wrote the letters, Judge Murphy had been on the bench for about four and a half years. He was not a newcomer.

86. I have considered a number of Massachusetts cases, specifically, *In the Matters of: Morrissey*, 366 Mass.11(1974); *Bonin*, 375 Mass 680 (1978); *Donohue*, 390 Mass. 514 (1983); *King*, 409 Mass. 590 (1991); *Brown*, 427 Mass. 146 (1998); and *Markey*, 427 Mass. 797 (1998); I will not review them except to summarize that all ended in public censure and that when there were additional sanctions, the offenses were uniformly of a graver nature, often much graver, than those of Judge Murphy.

87. Counsel for Judge Murphy has directed me to the Commission's Report to the Supreme Judicial Court dated January 20, 2006 and, more specifically, to the cases discussed there, in which judges agreed to various sanctions. Interestingly, the agreed sanctions are more severe than the cases reviewed above would suggest, but, in any event, I agree with Mr. Mone that the offences which the judges admit to are graver than Judge Murphy's.

88. Counsel has directed me to cases from other jurisdictions - cited because they included use of official stationery as an offense charged (counsel were not able

to cite any Massachusetts cases with that ingredient.)²¹ Counsel for Judge Murphy cites *In the Matter of Honorable Winston V. Buford*, 577 S.W. 2d 809 (1979), in which the Missouri Supreme Court found that use of court stationery to make a demand letter to an insurance company did not violate the Missouri Code. The court stated that the recipient of the letter knew the judicial status of its writer and that the use of the letterhead added nothing to the claim. From the report it does not appear that the Missouri Code contained an express ban on use of stationery, but more important, the court did not focus on the content of the letter, only on the use of the stationery.

89. Counsel for the Commission also cites out-of- state cases. However, the facts in them are different enough from the facts here that they do not suggest any particular sanction. Moreover, the sanctions imposed are a mixed bag, ranging from a six month suspension, to admonition, to public admonishment, to censure with a \$5,000 fine, to private reprimands.

90. I recommend that (1) Judge Murphy be publicly reprimanded, and (2) he be assessed the costs and expenses of the Commission during this formal hearing.

Dated: November 19, 2007

Peter W. Kilborn
Peter W. Kilborn, Hearing Officer

²¹ Counsel for Judge Murphy cites CJE Opinion No 2005-1, in which the Committee on Judicial Ethics stated that a letter of recommendation to the Judicial Nominating Commission could be written on court stationery. That might be of some significance if Judge Murphy's only problem were that he used court stationery, forgetting about the context and what was said in the letters and how.

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
BOSTON, MA 02109

ERNEST B. MURPHY
ASSOCIATE JUSTICE

2/20/05

Dear Pat,

I trust you continue (as do I) to honor the privacy of our personal communications in the nature of what is generically referred to as "settlement discussions" in my business.

As you no doubt clearly recollect, de Mike Ditka here warned you against playing "the Team from Chicago" in this particular Super Bowl.

Well, you know, I don't walk around telling that story. I just think it's sad I had to prove it to you. Took a lot out of me.

The reason I write now is that I think you a smart and honorable guy. And since every single thing I told you about what was going to happen in this case thusfar, has happened, maybe, just maybe, I have some credibility with you at this point.

So, here's the deal. I'm heading off to St. Martin, and I'll be back in town, for business purposes, on Monday, March 7. I will be checking my e-mail [bigemur@aol.com] while I'm down there.

I'd like to meet you at the Union Club on Monday, March 7. (No magic to the date.) (But it needs to be early in that week.)

Here's what will be the price of that meeting. You will have one person with you at the meeting. I suggest, but do not insist, that such a person be a highly honorable and sophisticated lawyer from your insurer.

in this meeting. Or notify that firm that such a meeting is to take place.

I will have my attorney (either Owen Todd or Howard Cooper) at the meeting. The meeting will be AB-SO-WTF-LY confidential and "off the records" between four honorable men.

You will bring to that meeting a cashier's check, payable to me, in the sum of \$3,260,000. No check, no meeting.

You will give me that check and I shall put it in my pocket.

I will say to you, if, at the end of this meeting, you can stand before the God of your understanding, and as a man of honor, ask for the return of that check, I'll flip it back to you.

And then, I shall explain to you why it is in your distinct business interest to rise from the table, shake my hand, and let me walk away with that check.

Because it is, Mr. Purcell, in your distinct business interests to do so, in my considered opinion; and I have not the slightest apprehension of failure of my ability to make you (and your insurers) concur in that assessment.

Sincerely,

Ernie Murphy

COMMONWEALTH OF MASSACHUSETTS
THE SUPERIOR COURT
BOSTON, MA 02109

ERNEST B. MURPHY
ASSOCIATE JUSTICE

2/19/05

P.S. If you conclude you have no interest in the meeting I propose, I ask that you throw the letter away and pretend it never was received. I am NOT copying this letter to anyone.

I consider it private settlement discussion between principals to a transaction, and I assure you it provides you with no tactical or strategic advantage in the case.

Else, Mr. Purcell, you probably recognize by now, it would never have been written.

I am simply trying to exit this matter NOW, to my maximum advantage, and what I believe, Pat, is yours as well.

It would be a mistake, Pat, to show this letter to anyone other than the gentleman whose authorized signature will be affixed to the check in question.

In fact, a BIG mistake. Please do not make that mistake.



3/18/05

Dear Pat,

Read the article in the Globe today. Believe me, I take no joy from your troubles.

I'm going to, once again, principal to principal, as "settlement negotiations" - off the record - just between you and me - tell you something which may help you in your decision-making. Something for nothing.

And that is you have a ZERO chance of reversing my jury verdict on appeal.

Anyone who is counselling you to the contrary ... is WRONG. Not 5% ZERO.

AND I will NEVER, that is as in NEVER, share a dime from what you owe me.

You and/or your insurer want to pay me \$331,056/yr for the next two or three years while you spend another 500 large tilting at windmills in the appellate courts be my guest.

You are lucky, Mr. Purcell that that jury came back at 2 million. I was betting on 5.



COMMISSION ON JUDICIAL CONDUCT

COMPLAINTS NUMBERS 2006-9 AND 2006-30, AGAINST ASSOCIATE JUSTICE ERNEST B. MURPHY

HEARING OFFICER'S REPORT

CHRONOLOGICAL TABLE

DATE	EVENT
February 13, 2002	<i>Boston Herald</i> publishes first article
June 3, 2002	Judge Murphy files libel action
October 1, 2003	Current Code of Judicial Conduct goes into effect
October, 2003	First meeting between Judge Murphy and Patrick Purcell
April, 2004	Second meeting
February 18, 2005	Jury verdict for Judge Murphy for \$2,090,000
February 20, 2005	First letter by Judge Murphy to Patrick Purcell
March 18, 2005	Second letter
December 21, 2005	Copies of portions of the letters published in the <i>Herald</i> and full text on its website
January 10, 2006	Commission files complaint against Judge Murphy
February 17, 2006	<i>Herald</i> files complaint against the judge